

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Communications Assistance for	)	ET Docket No. 04-295
Law Enforcement Act and	)	
Broadband Access and Services	)	RM-10865

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
COMMENTS IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING  
AND THE INITIAL REGULATORY FLEXIBILITY ANALYSIS

NATIONAL TELECOMMUNICATIONS  
COOPERATIVE ASSOCIATION

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NTCA Comments  
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## SUMMARY

In order to promote CALEA compliance, the Commission has put forth several proposals. While NTCA agrees that Congress intended that broadband access and VoIP providers would be subject to the Act's mandates in most circumstances, the Commission's proposals regarding extensions and waivers are troublesome. In an attempt to force carriers into CALEA compliance, the Commission proposes regulations that virtually guarantee small carrier non-compliance. The public interest demands that the Commission consider alternative regulation that will fully protect rural carriers and their customers from unnecessarily burdensome CALEA regulations.

NTCA asserts that in order to protect the viability of rural carriers and to ensure the capability of the rollout of advanced services, the Commission should continue to make Section 107(c) extensions available for small carriers who are unable to comply with circuit-based or packet-mode CALEA requirements. In the case that these extensions are not available for packet-mode requirements, the Commission should declare that if CALEA solutions are not available to small carriers, compliance with CALEA's mandates is not reasonably achievable under Section 109(b). In such a circumstance, the supporting documentation for a Section 109(b) petition should include no more than enough information for the Commission to conclude that compliant equipment is not available.

In addition, NTCA calls for the Commission to declare that the Section 109 filing fee is waived for all small and rural carriers in an attempt to relieve the financial burdens that further disable the carriers from becoming compliant.

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The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> submits these comments in response to the Commission's Notice of Proposed Rulemaking released August 4, 2004<sup>2</sup> and its accompanying Initial Regulatory Flexibility Analysis (IRFA).<sup>3</sup> NTCA generally agrees with the Commission's tentative conclusion that providers of broadband access and VoIP services should be subject to the Communications Assistance for Law Enforcement Act (CALEA) and its recognition that a public interest analysis may exempt some small providers from the Act's mandates. However, the Commission's proposed regulations on which carriers are eligible for relief go too far in an apparent attempt to force carriers and manufacturers to develop packet-

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents nearly 600 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities

<sup>2</sup> Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket No. 04-295, RM-10865, FCC 04-187 (rel. August 9, 2004). (NPRM)

<sup>3</sup> NPRM, Appendix B.

mode CALEA solutions. Law Enforcement and the Commission's frustration with the slow progress toward CALEA compliance is causing them to adopt proposals that are unreasonable and unworkable for small, rural telephone companies. The granting of Section 107(c) extensions for carriers who need additional time to comply is a reasonable and cost-effective way for all interested parties to eventually reach full CALEA compliance. The Commission proposes doing away with 107(c) petitions for packet-mode technology in favor of Section 109(b) waiver petitions. However, Section 109(b) waiver regulations as proposed raise the bar for relief to a level unattainable by small carriers. The Commission's proposed regulations will force rural carriers to a situation where they are unable to comply with the law. The Commission has an obligation to consider alternatives that are less burdensome.

**I. PROVIDERS OF BROADBAND ACCESS AND VoIP SHOULD BE SUBJECT TO CALEA IN MOST CIRCUMSTANCES**

Only providers of "telecommunications" services are subject to CALEA.

Information service providers are not. CALEA is not the only law to distinguish providers of telecommunications services from providers of information services. The Communications Act also does so. While the debate on how to determine what makes a carrier an information service provider rather than a telecommunications service provider has been complicated and protracted under the Communications Act, it is unnecessary in the CALEA context. When it enacted CALEA, Congress' stated intention was "to preserve the government's ability . . . to intercept communications involving advanced technologies such as digital or wireless transmission modes."<sup>4</sup> Section 102(8)(A) refers

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<sup>4</sup> H.R. Rep. No. 103-827(I) (1994).

to both switching and transmission functionalities. The Commission is correct in concluding that persons or entities that provide replacement for a substantial portion of the local telephone exchange service, whether they are providers of broadband Internet access services or providers of VoIP, should be subject to CALEA.

The Commission tentatively concludes that facilities-based providers of any type of broadband Internet access services may be subject to CALEA.<sup>5</sup> NTCA agrees that services, such as cable modem, wireless, or broadband over power lines, that may be used in the same manner as dial-up Internet access service should be subject to the same regulation as dial-up service under CALEA. This conclusion is logical and is squarely within the intent of Congress in drafting the Act. If dial-up is available to law enforcement, its replacement must also be in most circumstances. To conclude otherwise would not only be contrary to the law's intent, it would permit and encourage those with motive to avoid law enforcement's prying eyes by turning to new technologies.

Similarly, managed VoIP services should be subject to CALEA. VoIP technology enables individual subscribers to use the Internet to replace the traditional POTS functionality of the local exchange carrier.

## **II. A PROPER PUBLIC INTEREST ANALYSIS EXEMPTS SMALL BUSINESSES PROVIDING BROADBAND ACCESS OR VoIP FROM CALEA'S SUBSTANTIAL REPLACEMENT PROVISIONS**

The law permits the Commission to subject a person or entity to CALEA's substantial replacement provisions only if it is in the public interest to do so. To determine whether the public interest is served by a CALEA designation, Congress directed the Commission to consider three factors: 1) whether it would promote

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<sup>5</sup> NPRM, ¶ 37.

competition; 2) whether it would encourage the development of new technologies; and 3) whether it would protect public safety and national security.

While most broadband access providers should be subject to the substantial replacement provisions of CALEA, the Commission correctly recognizes that there are groups of entities for which inclusion is contrary to the public interest.<sup>6</sup> Exempting small businesses, such as NTCA's members, from CALEA's requirements would enable these small carriers to use their limited resources for deployment rather than compliance. New technologies will be developed and deployed in rural areas, satisfying the first and second prong of the public interest test. And as the Commission acknowledges, Law Enforcement could meet their surveillance needs through less burdensome means, thereby not negatively impacting the third public interest safety factor.

Broadband deployment in rural areas is an expensive endeavor but the public benefit is immeasurable. Unlike a large carrier, a rural carrier is a member of the community where it is situated and recognizes the necessity of broadband to ensure the community's future viability.<sup>7</sup> Deployment occurs for the benefit of the community, not the shareholders. But deployment cannot occur in a vacuum. Every additional financial burden hampers the rollout of new services. CALEA compliance is expensive and time consuming. In many rural areas, especially those with little or no prior surveillance activity, rollout of broadband will benefit the public more than strict compliance with the

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<sup>6</sup> The Commission fails to include a possible exemption from the substantial replacement provision as part of its IRFA. Examining the merits of a public interest determination that small carriers should be exempt from the substantial replacement provisions of CALEA is one way the Commission could lessen the regulatory burdens on small businesses in partial satisfaction of its Regulatory Flexibility analysis obligations.

<sup>7</sup> About half of NTCA's members are cooperatives, owned by the subscribers they serve.

CALEA mandates will. A proper public interest analysis dictates that small and rural carriers not be subject to the substantial replacement provisions of CALEA.<sup>8</sup>

### III. THE COMMISSION SHOULD MAKE NO DETERMINATIONS ABOUT THE USE OF “TRUSTED” THIRD PARTIES

The Commission seeks comment on the “trusted third party” approach as a means for making content or call-identifying information available to law enforcement. While NTCA recognizes that using a “trusted third party” may be a cost efficient means of complying with some CALEA provisions for some small carriers, it is not the solution the Commission envisions.

NTCA is troubled by the Commissions stating that it “believe[s] that the availability of a trusted third party approach makes call-identifying information ‘reasonably’ available to a telecommunications carrier under Section 103(a)(2).” With this determination, the Commission makes the leap from, technology is in existence, to, information is “reasonably” available. However, what is reasonable to one carrier may not be reasonable to another. There are many factors that determine what is reasonable and the determination must be performed on a case-by-case basis. There are issues of cost, actual availability and equipment compatibility that must be considered.

There is also a real danger that if the Commission determines that the trusted third party approach makes call-identifying information reasonably available, it pre-judges that compliance is reasonably achievable under Section 109. The bar for a 109 petition would

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<sup>8</sup> The Commission must take care to ensure that this exemption is applied in a technology-neutral manner. NTCA notes that the NPRM only discusses the public interest benefits of *wireless* broadband Internet access. CALEA regulations should not be used to provide a competitive advantage to any particular provider based on the broadband technology employed.



be raised to an impossibly high level, virtually guaranteeing that no small carrier could qualify for reimbursement, a result clearly contrary to Congress' intent.

Further, a Commission determination that the existence of a third party makes information reasonably available will create contractual and enforcement problems. Such a Commission determination would put small carriers at the mercy of the third parties. Small carriers would have no negotiating power. They would be forced into agreements with the third parties, no matter the cost – monetary or otherwise. The third party would be “trusted” to comply with the law, but there is no language that permits enforcement action against the third party. The carrier would suffer the consequences if the third party should not have been trusted or goes out of business.

There are simply too many factors out of the Commission's or the carriers' control for there to be a blanket determination about using third parties for CALEA compliance. The existence of a third party who could potentially gain access to some information does not make that information “reasonably available” to all. The use of third parties in the CALEA compliance efforts should be at the discretion of the carriers, with no prior determinations from the Commission.

#### IV. SECTION 107(C) EXTENSIONS ARE NECESSARY FOR SMALL, RURAL CARRIERS TO MAKE A SMOOTH TRANSITION TO FULL CALEA COMPLIANCE

##### A. 107(c) Extensions Should Be Available For Small Carrier Compliance With Circuit-Based CALEA Requirements

The Commission questions whether it should authorize additional 107(c) CALEA extensions to small and rural carriers. The 107(c) extensions provided in conjunction with the FBI's Flexible Deployment program has been a successful cooperative effort

hastening CALEA deployment. Carriers and Law Enforcement are working together to ensure that CALEA compliance is achieved in a timely, cost-effective manner. The program is a success and should continue. Many rural carriers still need time to bring all of their systems into compliance and law enforcement is amenable to providing it.<sup>9</sup>

B. Further Extensions Are Necessary For Small Carrier Compliance With Packet-Mode CALEA Requirements

Law Enforcement and the Commission are frustrated that progress toward achieving packet-based compliance has been slow.<sup>10</sup> It has received more than 800 packet-mode extension petitions from large and small carriers.<sup>11</sup> In an apparent attempt to force carriers into compliance, it concludes that Section 107(c) petitions are no longer available for packet-mode technology and that carriers “face a high burden” in making an adequate showing to obtain alternative relief pursuant to Section 109(b).<sup>12</sup> The Commission acknowledges that under its interpretation, “many carriers could find it difficult to obtain either CALEA compliance extensions or exemptions in connection with packet requirements.”

Industry has provided a list of reasons why packet-mode compliance has been slow and the Commission acknowledges some of them at paragraph 95. Rather than examine the veracity of the carriers’ claims, the Commission attempts to punish all

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<sup>9</sup> The Commission fails to include the availability of 107(c) extensions as part of its IRFA. Examining further extensions for small carriers is another example of how the Commission could lessen the CALEA regulatory burdens on small businesses in partial satisfaction of its Regulatory Flexibility analysis obligations.

<sup>10</sup> It is worth noting that equipment deployed before 1995 is deemed CALEA compliant unless Law Enforcement agrees to pay for upgrades. However, the equipment is only deemed compliant if the equipment has not been replaced or significantly upgraded or otherwise undergone major modification. Although it is up to Law Enforcement to define “replaced,” “significantly upgraded” and “undergone major modification,” it has not yet done so. Rural carriers are left with little guidance about whether or not their pre-1995 equipment is CALEA compliant.

<sup>11</sup> NPRM, ¶ 95.

<sup>12</sup> NPRM, ¶ 98.

carriers, small and large alike, for the lack of available solutions. There is no industry – wide conspiracy to avoid CALEA compliance and this “compliance at all costs” mentality will serve only to harm small and rural carriers and their customers.

Small and rural carriers are at the mercy of large carriers and manufacturers when it comes to compliant equipment. Small carriers lack the market power to compel the manufacturers to develop solutions. Typically, a manufacturer creates a product for large carriers and then makes it available to small carriers. The rural carriers’ ability to “actively and consistently advocate for the development of technical standards and solutions”<sup>13</sup> is minimal. Small carriers are not only last in line to receive a product, they lack the power to determine what product is made available. The proposed approach on CALEA packet-mode compliance will force rural carriers to forgo upgrading systems for fear of CALEA enforcement action.

The Commission recognizes that its “interpretation [of the law] could create potentially heavy burdens for small and rural carriers in particular.” The NPRM’s IRFA offers only Section 109, an admitted “high burden,” as an avenue of relief for small businesses. However, this avenue of relief is not one available only to small businesses and in fact, burdens small carriers to a much greater extent than it does large carriers.<sup>14</sup> Unlike large carriers, most rural carriers will be forced to hire outside counsel to prepare and file Section 109 petitions. As proposed, the filings will be detailed, time consuming

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<sup>13</sup> NPRM, ¶ 100.

<sup>14</sup> See also, V. *supra*.

and therefore, costly. They also carry a hefty filing fee.<sup>15</sup> The Section 109 “alternative” does not, in any way, lessen the burden for small businesses.

The Regulatory Flexibility Act compels the Commission to consider less burdensome alternatives for small businesses. Section 107 extension requests have been successful in the circuit mode environment and they will continue to work for small carriers and Law Enforcement for packet technology. Small and rural carriers must have the ability to request and receive extensions from CALEA packet-mode requirements at least until compliance is achievable.

#### V. THE COMMISSION MUST MAKE SECTION 109 PETITIONS A REASONABLE AVENUE OF RELIEF FOR SMALL CARRIERS

Assuming that the Commission concludes that Section 109 petitions are the only avenue of relief, the Commission’s tentative conclusions regarding Section 109 petitions are contrary to the public interest and the law.<sup>16</sup> The Commission states that carriers “will be expected to demonstrate active and sustained efforts at developing and implementing CALEA solutions for their operations, *i.e.*, regardless whether CALEA solutions for packet-mode are generally available.” It expects carriers to engage in “sustained and systematic negotiations with manufacturers and third providers.” Without documentation of these negotiations, the Commission proposes to reject petitions for relief.

The Commission’s proposals are nonsensical. While Section 109(b) makes no reference to “available technology” in connection with a showing of what is and is not

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<sup>15</sup> The Commission may waive the filing fee, but only as a refund. The carrier must make the payment upfront.

<sup>16</sup> If the Commission concludes that 107(c) extension petitions are appropriate for packet-mode technology, the proposals of this section regarding what a petition must include should apply to extension requests.

reasonably achievable, the list does permit the Commission to consider factors it deems appropriate. The Commission must logically conclude that if the technology is not available to small and rural carriers, compliance by small and rural carriers is not “reasonably achievable.”

The Commission proposes that instead of permitting rural carriers to assert that technology is not available in Section 109 petitions, they must document their “sustained and systematic” negotiations for equipment that does not exist. The Commission fails to recognize that small and rural carriers do not have the staff or resources to devote to such futile efforts.

The Commission is trying to force the industry to comply by raising the bar for waiver to an impossibly high level. This strategy may work for large carriers with resources to negotiate and force manufacturers to develop solutions, but it creates an unnecessary and substantial burden for small carriers.

The Commission should consider less burdensome 109 filing requirements for small and rural carriers. The Commission should declare that for small carriers CALEA compliance is not “reasonably achievable” if compliant equipment is not reasonably available. Rather than force carriers into “systematic negotiations,” small carriers should be permitted to document their efforts to obtain compliant equipment. A statement, letter, or recital that the manufacturer cannot produce equipment should satisfy the Commission and enable it to grant at least a temporary waiver from CALEA’s mandates. The Commission should also declare that the Section 109 filing fee is waived for all small, rural carriers. The filing fee is onerous and should not be a deterrent for a carrier in legitimate need of relief.

## VI. RURAL END USERS SHOULD NOT BEAR THE FINANCIAL RESPONSIBILITY FOR CALEA COMPLIANCE

The Commission tentatively concludes that carriers bear responsibility for development and implementation costs for post-January 1, 1995 equipment and facilities.<sup>17</sup> Section 107(b)(3) of the Act requires the FCC to “minimize the cost of such compliance” on consumers. The FCC is directed to pay attention to “the impact on rates for basic residential telephone service . . .”<sup>18</sup> The potential cost to make post-1995 equipment CALEA compliant is high and the amount that would have to be passed on to consumers, substantial. The impact on rural carriers and their consumers is much greater than that for large carriers. The costs are comparable, but the subscriber base over which to spread the costs for rural carriers is much smaller. Each rural consumer would be forced to assume a disproportionate share of the burden. The FCC must consider the end user in determining how costs will be recovered for CALEA compliance.

## VII. CONCLUSION

The Commission has put forth several proposals in an attempt to meet Law Enforcement’s surveillance needs and to stimulate CALEA compliance. While NTCA agrees that Congress intended that broadband access and VoIP providers would be subject to the Act’s mandates, the Commission’s proposals regarding relief to carriers in the form of extensions and waivers are unnecessary and overly burdensome.

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<sup>17</sup> NPRM, ¶ 125.

<sup>18</sup> See CALEA Order on Remand ¶ 62 (citing 140 Cong. Rec. H10773-02, 10780 (daily ed. Oct. 4, 1994) (statement of Rep. Markey)).

NTCA has identified several alternatives that would lessen the impact of the CALEA regulations on small and rural carriers:

- 1) The Commission should perform a public interest analysis to determine that small and rural providers of broadband access or VoIP should not be subject to CALEA's mandates;
- 2) The Commission should continue to make Section 107(c) extensions available for small carriers unable to comply with circuit-based CALEA requirements;
- 3) The Commission should continue to make Section 107(c) extensions available for small carriers unable to comply with packet-mode CALEA requirements;
- 4) If the Commission determines that extensions are not available for post-1995 equipment, the Commission should declare that if CALEA solutions are not available to small carriers, compliance with CALEA's mandates is not reasonably achievable under Section 109(b);

- 5) If CALEA extensions are unavailable to small carriers, the Commission should declare that small carriers who provide documentation about their inability to obtain compliant equipment have satisfied the filing requirements of Section 109(b); and
- 6) The Commission should declare that the Section 109 filing fee is waived for all small and rural carriers.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in ET Docket No. 04-295, RM-10865, FCC 04-187 was served on this 8th day of November 2004 by first-class, U.S. Mail, postage prepaid, to the following persons.

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